IN THE

Supreme Court of the United States

October Term 1946

No. 931

GEORGE HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

MOTION AND BRIEF ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S APPLICATION FOR A REHEARING

American Civil Liberties Union,
Amicus Curiae.

[illegible]
of the New York Bar,

[illegible]
of the District of Columbia Bar,

On Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 34

GEORGE HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Now comes, The American Civil Liberties Union, by its attorneys, and respectfully moves for leave to file the attached brief, as *Amicus Curiae*, in the above entitled cause. As grounds for said motion movant shows:

1. The American Civil Liberties Union is a non-profit corporation, dedicated to the maintenance and protection of the civil liberties, guaranteed by the Bill of Rights. As such it has an interest in the subject matter of this case.

2. The Petitioner, George Harris, has filed herein a petition for rehearing and the movant desires to support that petition.

3. The Solicitor General has consented to the filing of this brief. Counsel for Petitioner has indicated that he has no objection to the granting of this motion.

Respectfully submitted,

James Lawrence Fly,
Charles A. Horsky,
Counsel for
American Civil Liberties Union.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 34

GEORGE HARRIS,
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v.

UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S APPLICATION FOR A REHEARING

The American Civil Liberties Union is an organization dedicated to the maintenance and protection of the civil liberties guaranteed by the Constitution—the necessary elements of the freedom and order basic to the functioning of our democracy. In its behalf, with the consent of counsel for the parties, we offer this brief in support of petitioner's petition for a rehearing because we believe the decision of the Court in this case undermines one of the most vital of these liberties—the guarantee of the Fourth Amendment that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant cases and legal distinctions have been presented in the briefs already submitted to this Court. The American Civil Liberties Union here is concerned not only with the result upon the accused but also with the far reaching consequence of the decision.

We believe that the underlying issue here is whether the right of the individual to the privacy of his home is to depend in the future upon the discretion of arresting officers rather than upon the judgment of a magistrate.

We respectfully submit that this Court erred in determining the constitutional reasonableness of the search and the seizure in the instant case for these reasons:

1. The decision sanctions a further encroachment on the safeguards of the Fourth Amendment without giving due weight to the practical effects of that encroachment on the day-to-day lives of private citizens.

2. In any event, the measures employed by the arresting officers in this particular case went beyond those reasonably necessary to effective law enforcement.

The Fourth Amendment protects "the sanctity of a man's home and the privacies of life" and guards against "the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense." *Boyd v. United States*, 116 U. S. 616, 630. Being the pillar of a basic civil liberty, it "should receive a liberal construction." *Gouled v. United States*, 255 U. S. 298, 304; *Go-Bart Co. v. United States*, 282

U. S. 344, 357; *United States* v. *Lefkowitz*, 285 U. S. 452, 464. Any doubts should be resolved in its favor. Exceptions should be carefully limited and not expanded. A man's home is to be his castle to the greatest extent consistent with the public order and the common good. *Ibid.*

While "there is no formula for the determination of reasonableness," and "each case is to be decided on its own facts and circumstances," *Go-Bart Co.* v. *United States*, 282 U. S. 344, 357, it is submitted that the Amendment, as its terms clearly imply, intends, with only minor exceptions, noted below, to restrict searches to those *reasonable* in nature and executed pursuant to search warrants, issued in accordance with the constitutional safeguards. *Agnello* v. *United States*, 269 U. S. 20, 33; *United States* v. *Lefkowitz*, 285 U. S. 452, 463-464. The exceptions involve (a) a search reasonably incident to a lawful arrest, e.g., *Agnello* v. *United States*, 269 U. S. 20; *Marron* v. *United States*, 275 U. S. 192; see also *Davis* v. *United States*, 328 U. S. 582; *United States* v. *Kirschenblatt*, 16 F. (2d) 202; and (b) situations where it is not practicable to secure a search warrant, see *Carroll* v. *United States*, 267 U. S. 132; *United States* v. *Lee*, 274 U. S. 559.

I

The first problem here is the scope to be permitted to the exceptional search and the seizure incident to a lawful arrest. It is well settled that this exception is to be narrowly and carefully limited so as not to render the constitutional requirements for a search warrant practically nugatory.

> The authority of officers to search one's house or place of business contemporaneously with his lawful

> arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States v. Lefkowitz*, 285 U. S. 452, 464.

In other words, to permit searches incident to an arrest to have a greater scope than searches pursuant to the safeguards set forth in the words of the Constitution broadly and dangerously subverts the Amendment. It is unreasonable to allow a man's home to be invaded and his privacy and security disturbed to a greater extent by search incident to arrest than by search pursuant to a search warrant circumscribed by the constitutional limitations. *Gouled v. United States*, 255 U. S. 298, 308-309. See also *Marron v. United States*, 275 U. S. 192, 196; *Go-Bart Co. v. United States*, 282 U. S. 344, 357. For these constitutional requirements, unambiguously set forth in the Amendment, emphasize, "the purpose to protect against all general searches." They prevent "the issue of warrants on loose, vague or doubtful bases of fact." *Ibid.* Yet, to give searches incident to arrests the scope accorded them by the instant decision is to permit just the sort of "general searches" sought to be prevented by the Amendment. To expand the exception, the search and

seizure permissible in the case of an arrest, to the extent approved here, "reduces the Fourth Amendment to a form of words." *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392.

The Court's decision shifts the control over searches and seizures from the magistrates, where it is placed by the Constitution, to the police officers who will henceforth execute arrests. Arresting officers, in making their searches, need only act in a manner "consistent" with their looking for objects which could be described as "means" or "fruits" or "instrumentalities" of the crime for which the arrest was made. So long as this requirement is observed, a warrant of arrest affords greater scope for search and seizure than a search warrant itself and avoids the necessity for observing the constitutional safeguards hedging search warrants. Whatever is left of those safeguards as the result of this decision, in the case of arrests, will, in practice, undoubtedly be entirely eliminated. By careful learning and observance of the approved formula, police now, in making arrests, face no limitation to search and seizure that is not self-imposed. With the tremendous spread of police agencies in a modern complex society, this prospect is not inviting.

The argument that search in case of arrest is necessarily limited to a particular time, a particular place, and particular objects (the fruits or instrumentalities of the crime for which the accused is arrested) and that probable cause must first have been established as grounds for the arrest does seem to embrace some "limitations" on the right to search. But these apparent "limitations" evaporate when reduced from words to facts. Almost any crime for which an arrest is made will have, either as "fruit" or as "instrumentality," something which might have been secreted somewhere upon the premises where the

arrest is made—assuming, of course, the arrest is made in a place where the arrested person is not without roots of one sort or another. And what is the significance of the fact that, in the nature of things, a man can be arrested only at a particular time and in a particular place? This "particularity" is wholly within the discretion of those carrying the warrant of arrest. The warrant of arrest itself does not prescribe the time and place; by its very nature, it cannot do so. In terms of actual practice and effect, the right, incident to valid arrest, to make an unlimited search of the entire premises where an arrest takes place empowers one with a warrant of arrest to make a general and exploratory search of any place which the person to be arrested occupies and where he may be found. Cf. *Go-Bart Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452. Little ingenuity need be credited to those who execute arrests to make sound the prediction that arrest warrants will in large measure supplant search warrants and that the safeguards against invasion of privacy will rest in the individual officer's discretion rather than in the procedures and magistrates contemplated by the Constitution.

Marron v. *United States*, 275 U. S. 192, illustrates how easy it would be, as a practical matter, for searchers, searching incidentally to an arrest, to contend they were looking for the "fruits" or "instrumentalities" of the crime and not engaging in general, exploratory searches. The Court there held that "a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business" (275 U. S. at 194) was "a part of the outfit or equipment actually used to commit the offense" (275 U. S. at 199) of violating the prohibition laws and was not merely evidentiary. The decision makes obvious that resort to a

rule regulating searches incident to arrests which makes necessary a case-by-case differentiation between items that are merely "evidentiary," and items which are "fruits" or "instrumentalities," would be no practical deterrent to general, exploratory searches. For in a practical sense, anything linking the arrested to some crime will be both "evidentiary" and a "fruit" or "instrumentality." And the Court, at any rate, has not specified any criteria which will inform police officers how the line of demarcation is to be determined.

The Court's holding that the search for the means employed by petitioner in committing the crime for which he was arrested was reasonable, even if conceded, cannot serve to make lawful the seizure of the irrelevant registration certificates and the classification cards. The search could be considered reasonable only as an incident of that particular arrest, and its scope should be restricted to the means or fruits of the crime for which the arrest was made. If the search incident to an arrest is not so limited, its permissible sweep is greater than that of a search pursuant to a search warrant but is wholly lacking in the constitutional safeguards of the latter. *Marron v. United States*, 275 U. S. 192, 196.

II

Even if this Court were willing to sacrifice constitutional safeguards to the necessities of law enforcement, the necessity is not established here. As a practical matter, observance of the established safeguards against unreasonable searches and seizures need not unduly impede the work of the police. It would not have done so in this case.

The facts here demonstrate that the work of the investigators would not have been made ineffective had they

been required to procure a search warrant for the objects for which they were allegedly looking. Shortly after the arrest of petitioner and the commencement of the search of petitioner's apartment, one of the investigators felt it not unreasonable to leave the apartment to secure a warrant to search petitioner's automobile and his office (R. 19, 70, 72, referred to in Brief for the United States, p. 8), which was secured and pursuant to which a search of the automobile and office was made (R. 20-21, 68, 73, referred to in Brief for the United States, p. 8). So far as appears, it would have been an expeditious, timely procedure to get a search warrant to search for the checks at the same time. Then, when the classification cards and registration certificates were discovered, a search warrant could have been obtained for them. 40 Stat. 217, 228, 18 U. S. C. §612. While authority to search or seize was being duly obtained, the premises could have been watched. The inconvenience to the police resulting from this procedure would be clearly outweighed by the protection afforded to the right against unreasonable search and seizure. Cf. *Taylor* v. *United States*, 286 U. S. 1, 6.

CONCLUSION

***Amicus*, therefore, respectfully submits that petitioner's application for a rehearing should be granted.**

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,

JAMES LAWRENCE FLY,
Of the New York Bar,

CHARLES A. HORSKY,
Of the District of Columbia Bar,

Of Counsel.

May, 1947.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Before me the undersigned authority for said County in said State personally appeared Charlotta Gallap who, being by me first duly sworn stated on oath that on this 29th day of May, 1947, she deposited in the United States mail copies of the foregoing Motion and Brief correctly addressed to Roy St. Lewis, National Press Building, Washington, D. C., Counsel for the Petitioner, and to Honorable George T. Washington, Acting Solicitor General, Department of Justice, Washington, D. C.

CHARLOTTA GALLAP.

Sworn to and subscribed before me
this 29th day of May, 1947.

.....
Notary Public.